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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971
No. 71-782

FRED B. SMITH, SUPERINTENDENT OF INSURANCE OF OHIO,
Plaintiff-Petitioner,

v.

OHIO VALLEY INSURANCE COMPANY,
Defendant,

(BUCKEYE UNION INSURANCE COMPANY,
Intervening Defendant-Respondent),

(OHIO INSURANCE GUARANTY ASSOCIATION,
Intervening Defendant-Respondent),

(KEN BAILEY, ET AL.,
Intervening Defendant-Petitioner).

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT, BUCKEYE UNION INSURANCE COMPANY, IN OPPOSITION

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(Continued Inside Front Cover)

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BRIEF OF RESPONDENT, BUCKEYE UNION INSURANCE COMPANY, IN OPPOSITION

(a) **Opinions below.**

The opinions and decisions below are as stated by the petitioner in his petition and as contained in "Appendix A, Opinions Below and Orders of Courts Below", pages 21 through 68 of petitioner's brief. Pages 69 through 73 captioned "Stipulation" and forming part of petitioner's Appendix A form no part of the decisions or opinions below.

(b) **Jurisdictional Grounds:**

(i) **Date of judgment sought to be reviewed.**

Judgment of the Supreme Court of Ohio was rendered

July 21, 1971. Thereafter a motion for rehearing and reconsideration was filed on July 31, 1971. This respondent, thereafter, filed a motion to dismiss the petitioner's motion on August 3, 1971, due to untimeliness under Rule IX, Supreme Court of Ohio, Rules of Practice.[1] Subsequently, the petitioner's motion was denied without opinion.

(ii) Statutory provisions conferring jurisdiction on the Supreme Court of the United States.

If the provisions of 28 U.S.C. Section 2101 (C) have been met by petitioners then jurisdiction may be conferred by 28 U.S.C. Section 1257.

(c) Questions Presented for Review.

Questions numbered one through four under petitioner's caption of "Questions presented for review" (pages 2-4), insofar as they present federal constitutional questions were never presented to any court of the State of Ohio prior to a motion for rehearing and reconsideration filed in the Supreme Court of Ohio which motion was denied

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1. Rule IX, Supreme Court of Ohio, Rules of Practice, provided as follows:

Section 1. Motion for Rehearing.

A motion for rehearing shall be filed within ten days after the announcement of the decision. Such motion must be confined strictly to the grounds specified for rehearing and must not constitute a reargument of the case. Notice of such motion shall be served on opposing counsel who shall have five days to file his memorandum contra.

Section 2. Issuance of Mandate.

Ten days after the announcement of a decision on the merits, unless a motion for rehearing is filed, the Clerk shall issue a mandate in conformity to the entry of the Court. If a motion for rehearing is filed and denied, the mandate shall issue at the same time as the decision on the motion for rehearing. No mandate shall issue on denial of appeal or denial of leave to appeal.

without opinion. With regard to the fifth question presented by petitioner, this respondent believes that a proper state constitutional issue was made but the Supreme Court of Ohio did not deem it necessary except in a cursory manner to approach this problem to arrive at its decision.

(d) **Constitutional Provisions and Statutes Involved.**

The respondent accepts that the listing of constitutional provisions and statutes enumerated by the petitioner on page four of its brief are the fundamentally relevant legal provisions involved in the present dispute except that this respondent does not believe that any question concerning Amendment XIV, Section 1, United States Constitution is raised either substantively or procedurally by this case.

The respondent feels it incumbent to emphasize the provisions of Section 28, Article II, of the Constitution of the State of Ohio since this provision was the basis of much of the controversy as the matter was approached by the petitioner and respondent in the Tenth District Court of Appeals of Ohio and the Supreme Court of Ohio. Although the Supreme Court of Ohio did not deem it necessary to deal in depth with the Ohio constitutional issue potentially involved herein, the respondent would hereby reassert its reliance upon its arguments made in the reviewing courts which have previously dealt with this matter.

Article II, Section 28, Constitution of Ohio provides:

> "The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state."

(e) **Statement of the Case.**

The respondent agrees basically with the "Statement of the Case" as made by the petitioner on pages four through nine of his brief with the following qualifications:

1. The material concerning the role played by the amicus curiae, The National Association of Insurance Commissioners, in the Supreme Court of Ohio, (page 10 of petitioner's brief and "Appendix D", pages 97-98), which role was not sought by the amicus curiae until the filing of a motion for rehearing and reconsideration filed by the petitioner, are basically inappropriate under a categorization of "(f) Reasons relied on for the allowance of the writ." Additionally, the propriety of the petitioner's Appendices C (1), pages 92-93 of petitioner's brief, C (2), pages 94-95 of petitioner's brief, and D, pages 97-98 are of questionable propriety under Rule 23.3 of the Rules of Practice of this honorable Court.

2. The petitioner (page 8 of brief of petitioner) states that the Supreme Court of Ohio " . . . declined consideration of the question of retroactivity . . . " This represents a simplistic analysis of the decision of that court. The Supreme Court of Ohio definitely gave consideration to the issue of retroactivity. That court decided, that in view of the statutory language employed by the Ohio Legislature, no attempt was being made by the state legislature to make the provisions of Chapter 3955, Ohio Revised Code, retroactive in their operation.

3. As previously noted, the timeliness of the respondent's motion for reconsideration and rehearing in the Supreme Court of Ohio is in dispute.

4. This respondent will hereinafter be occasionally referred to as "Buckeye Union".

5. This respondent does not intend to challenge the involvement in this proceeding of Ken Bailey, et al. with the petitioner, Superintendent of Insurance of

Ohio or the statements contained in petitioner's brief on pages 18 and 19.

(f) **Argument.**

(i) **The issue presented is of transitory interest.**

The petitioner is requesting this Court to assume jurisdiction over a controversy which is ephemeral in nature. In a brief time, there will be no policyholders of Ohio Valley Insurance Company or claimants thereof. Moreover, as the date of the enactment of the Ohio Insurance Guaranty Act (as well as that of similar state legislation) becomes remote in time the possibility of similar situations arising diminishes. While the respondent would not suggest that this court close its doors to any worthy supplicant, the fact is that the petitioner has had this matter reviewed by three courts, five different times.

(ii) **The federal constitutional issue was not timely raised.**

The first time that any federal constitutional question was raised by any party was in a memorandum filed by the petitioner in support of a motion for rehearing and reconsideration of the decision of the Supreme Court of Ohio. That motion for rehearing and reconsideration was denied by the highest court of Ohio without opinion (q.v. page 22 of the petitioner's brief). The general rule which has been wisely adopted by this Court is that a federal question which is first presented on application or motion for rehearing in the highest court of a state, after a final decision of that court, and which is subsequently denied without opinion is raised too late to support the jurisdiction of this Court over the state court decision, *American Surety Company v. Baldwin*, (1932) 287 U.S. 156, 77 L. ed. 231, 53 Sup. Ct. 98; *Live Oak Water Users Assoc. v. Railroad Commission*, (1926) 269 U.S. 354, 70 L. ed. 305,

46 Sup. Ct. 149; *McGarrity v. Delaware River Bridge Commission*, (1934) 292 U.S. 19, 78 L. ed. 1095, 54 Sup. Ct. 565 (rehearing denied, 292 U.S. 607, 78 L. ed. 1468, 54 Sup. Ct. 771). Moreover, a review of the decision of the Supreme Court of Ohio will reveal that that court did not find it necessary to decide even a state constitutional question, let alone a federal constitutional question. The basis of its decision rests upon statutory construction derived from Ohio precedent.

The petitioner's assertion that a clear case of unjustifiable discrimination between claimants of the Ohio Valley Insurance Company first became apparent when the Supreme Court of Ohio held that the legislature intended to classify claimants according to the time relationship between their claims and the effective date of Chapter 3955, Ohio Revised Code, (brief of petitioner, page 17) is untenable. A dichotomy between those claimants whose claims arose prior to the effective date of Chapter 3955 and those whose claims arose subsequent to such effective date was very clearly created by the decision of the Court of Appeals of Franklin County, Ohio. Therefore, the so-called federal constitutional question which the petitioner would have reviewed was created, not by the Supreme Court of Ohio, but by the Court of Appeals of Ohio. If the petitioner wished to raise the federal constitutional question of discriminatory classification, he had ample opportunity in his motion for reconsideration directed to the Court of Appeals of Franklin County, Ohio, in his memorandum in support of jurisdiction directed to the Supreme Court of Ohio, and in his brief on the merits in the Supreme Court of Ohio. He chose not to raise such issue and should now be precluded from so doing.

The petitioner maintains (on page 18 of his brief) that the merits of his appeal are salvaged, regardless of the

timeliness of the manner in which he raised the constitutional issue. The cases relied upon by the petitioner, *Burton v. Wilmington Parking Authority,* (1961) 365 U.S. 715, 6 L. ed. 2d 45, 81 Sup. Ct. 856 and *Anonymous v. Baker,* (1959) 360 U.S. 287, 3 L. ed. 2d 1234, 79 Sup. Ct. 1157, are clearly distinguishable in two major respects: (1) a federal constitutional issue was raised in both cases at an incipient level of the controversies (i.e. in the *Burton* case in a Delaware Court of Chancery and, apparently, in the *Baker* case at the time that the proceeding progressed from a quasi-administrative hearing to that of a contempt proceeding); (2) this Court determined to hear these cases—not from any consideration of the timeliness in which the federal constitutional issue may or may not have been raised – but from a determination that the basis of the state court's decisions did not properly bring the cases within the purview of the statutory jurisdiction of this Court on appeal under 28 U.S.C., Section 1257(2), but that sufficient grounds had been raised to support review by the Court upon the allowance of petitions for writs of certiorari and the respective appeals would be so treated.

(iii) **The rationale of the decision sought to be reviewed rests entirely upon state law.**

The crux of the decision of the Supreme Court of Ohio (obviating the determination of a state constitutional issue) is that the intent of the Ohio Legislature can be determined from an analysis of the "operative language" employed in Chapter 3955, Ohio Revised Code, by application of a long series of decisions by the high court of Ohio which serve as precedent for such interpretation. As stated by the Supreme Court of Ohio:

> "A statute, employing operative language in the present tense, does not purport to cover past events of a

> similar nature. As a general rule, a statute is prospective in its operation 'unless its terms show clearly an intention that it should operate retrospectively.'" *Bernier v. Becker*, (1881), 37 O.S. 72, 74; *Allen v. Russell*, (1883), 39 O.S. 336, 339; *Cincinnati v. Seasongood*, (1889), 46 O.S. 296, 304; *Cincinnati, Hamilton & Dayton Rd. Co. v. Hedges*, (1900), 63 O.S. 339, 341; *Cowen v. State, ex rel. Donovan*, (1920), 101 O.S. 387. No such clear intention appears herein." *Smith v. Ohio Valley Ins. Co.*, (1971), 27 O.S. 2d 268, 276.

The decision of the Ohio Supreme Court, therefore, turned, not on any federal question or even state constitutional question, but rather upon Ohio precedents concerning statutory construction.

(iv) **The decision of the Supreme Court of Ohio is correctly circumspect in its scope.**

This case was consistently presented to the two reviewing courts of the State of Ohio by all parties actively participating in terms of an Ohio constitutional issue. That issue, as maintained by this respondent in the Supreme Court of Ohio,[2] was that requiring contributions to the Ohio Insurance Guaranty Association by insurance companies licensed to do business in Ohio (under Section 3955.01(D), Ohio Revised Code, membership in such association being required of practically all property-casualty insurers caring to do business in such state) was violative of Section 28, Article II, Constitution of the State of Ohio, which prohibits the general assembly of the state from passing retroactive laws. This provision further provides that this constitutional repugnance shall not apply to curative or remedial statutes.

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2. This respondent advocated in the Ohio Court of Appeals the position ascribed to it on page seven of the petitioner's brief.

The substance of the controversy thus litigated between the petitioner and respondent became a contest to establish Chapter 3955 as either substantive law or remedial law. The very real importance of this distinction under Ohio law can be gleaned from a brief statement of the judicial interpretation which has been placed upon the Ohio constitutional provision concerning retroactive laws previously cited. As stated by the Supreme Court of Ohio in *State ex rel., Crotty, v. Zangerle,* (1938) 133 O.S. 532, 11 O.O. 226, 14 N.E. 2d 932:

> "However, every statute that is designed to act retrospectively is not retroactive within the terms of Section 28, Article II, of the Constitution of 1851, which forbids the General Assembly of this state to pass "retroactive" laws. Whether a statute falls within the prohibition of this provision of the constitution depends upon the character of the relief that it provides. *If it creates a new right, rather than affords a new remedy to enforce an existing right, it is prohibited by this clause of the constitution of this state.*" 133 O.S. 532, 535 (emphasis added).

Recently, Justice Herbert, speaking for the Supreme Court Ohio in dealing with the issue of the retroactivity of a provision of the Workmen's Compensation Law and the dichotomy between substantive and procedural or remedial stated:

> "It is doubtful if a perfect definition of 'substantive law' or 'procedural or remedial law' could be devised. However, the authorities agree that, in general terms, substantive law is that which creates duties, rights, and obligations while procedural or remedial law describes methods of enforcement of rights or obtaining redress. *State v. Elmore,* 179 La. 1058, 155 So. 896; *Manuel v. Carolina Casualty Insurance Company* (La. App.) 136 So. 2d 275, 277; *40 Words and Phrases* (Perm. Ed.) 857." *State ex rel. Holdridge v. Industrial*

Commission, (1967) 11 O.S. 2d 175, 178, 40 O.O. 2d 162, 228 N.E. 2d 621.

The decision of the Supreme Court of Ohio, by not emphasizing the controversy as presented to it by the parties, has affirmed that, through the language employed by the legislature, the act is prospective in nature which obviates resolving the controversy created by the petitioner and this respondent concerning substantive and remedial legislation. If the Ohio Court had decided that Chapter 3955, Ohio Revised Code, is substantive, a retroactive application of it is specifically prohibited by the Ohio constitution as judicially interpreted. If the same legislation is curative or remedial, then its application in a retrospective manner has been determined to be implicitly excluded by statutory construction by the Supreme Court of Ohio which is unquestionably cognizant that the Ohio constitutional provision provides that curative or remedial legislation "may" be, but need not be, in contradistinction to the initial prohibition against "retroactive laws" contained in Article II, Section 28, Constitution of Ohio.

Considering this background, it seems incumbent upon the petitioner to either (1) create a true issue with regard to the legitimacy of Article II, Section 28, Constitution of Ohio which must be determined to be in contravention of the supremacy clause of the Federal Constitution, Article VI, Section 2, Constitution of the United States; or, (2) show an unreasonable and arbitrary classification by the decision of the Supreme Court of Ohio violative of the Fourteenth Amendment to the Constitution of the United States.

The first of the two issues referred to above has not been raised by the petitioner.

With regard to the second issue, this Court has several times declared that time may be a reasonable basis of classification under the Fourteenth Amendment to the Constitution of the United States, *Williams v. Walsh*, (1912) 222 U.S. 415, 56 L. ed. 253, 32 Sup. Ct. 137; *Sperry & Hutchins Co. v. Rhodes*, (1911) 220 U.S. 502, 55 L. ed. 561, 31 Sup. Ct. 490. In this case, not only is time of origin a reasonable basis for classification of "covered claims", it is sanctioned by the state constitution.

The case of *Mayflower Farms v. Ten Eyck*, (1935) 297 U.S. 266, 80 L. ed. 675, relied upon by petitioner on pages eleven and twelve of his brief, is readily distinguishable from the present situation. Apart from the strong dissent rendered by Mr. Justice Cardozo and concurred in by Justices Brandeis and Stone, the case concerns an attempted alteration of the competitive market system in an area (milk production) where such regulation is neither traditional or obviously necessary. This is in direct contrast to the insurance industry where state regulation of all facets of the business is the rule and judicially justified as a business impressed with a public trust. Thus, this Court, in the *Mayflower* case, made this distinction:

> "The challenged provision is unlike such [regulatory] laws, since, on its face, it is not a regulation of a business or an activity in the interest of, or for the protection of, the public, but an attempt to give an economic advantage to those engaged in a given business at an arbitrary date as against all those who enter the industry after that date." 297 U.S. 266, 274; 80 L. ed. 675. (bracketed material added)

Buckeye Union also believes that the result in this case is fair in view of the reasonable expectations of all of the parties involved.

The people who ultimately bear the burden, should this statute be construed in the retroactive manner which

the petitioners urge would be the policyholders of mutual companies and stockholders of this respondent and others similarly situated. The stockholders of the Buckeye Union Insurance Company, at the time they invested in the company, certainly did not expect to have their investments diluted due to the insolvency of any other insurance companies. Their investment was in the Buckeye Union Insurance Company and that company alone. At the time that the policyholders and claimants of the Ohio Valley Insurance Company became such, prior to the enactment of Chapter 3955, Ohio Revised Code, they could not expect to look to the assets of any fund or corporation other than that of the Ohio Valley Insurance Company. Therefore, with respect to the stockholders of the respondent, the interpretation of Chapter 3955 urged by the petitioner would take from them a part of their investment by the application of legislation passed after the "fact", thus creating liability in a confiscatory manner. With regard to the claimants and policyholders of the Ohio Valley Insurance Company, they would have received a pure windfall or boon. For this reason, and regardless of the Ohio constitutional provision prohibiting retroactive legislation, the interpretation given the Ohio Insurance Guaranty Act by the Ohio Supreme Court provides a reasonable classification based upon time which deprives the stockholders and claimants of the Ohio Valley Insurance Company of no rights which were vested in them prior to such enactment and which preserves to stock companies including this respondent and their stockholders and to mutual companies and their policyholders those vested property rights possessed by them prior to the act.

(g) **Summary.**

The controversy presented to this Court does not present a major issue since the effects of the Ohio Supreme Court

decision as described by the petitioner will quickly diminish in importance as the Guaranty Act matures. It seems undeniable that no federal constitutional issue was raised in a timely manner since none was raised until a motion for rehearing and reconsideration was filed in the highest Ohio court and that motion was denied without opinion.

Moreover, the decision sought to be reviewed rests solely upon statutory construction of an Ohio legislative act by the Ohio Supreme Court.

The decision by the Supreme Court of Ohio was based upon a reasonable classification, dictated by the Ohio Constitution, and fair in its application.

For the foregoing reasons, this respondent respectfully urges this honorable Court to deny the petition for writ of certiorari.

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Buckeye Union Insurance Company

AFFIDAVIT OF SERVICE

STATE OF OHIO
COUNTY OF FRANKLIN } SS

The undersigned, William L. Schmidt, attorney for respondent, Buckeye Union Insurance Company, states that he has on the 10th day of January, 1972, served by mail printed copies of the foregoing brief of respondent, Buckeye Union Insurance Company, in opposition on William J. Brown, Attorney General of Ohio, State House Annex, Columbus, Ohio 43215, and William M. Lane, Caren, Lane, Huggard, Alton & Horst, 150 East Broad Street, Columbus, Ohio 43215, Special Counsel, attorneys for petitioner, Superintendent of Insurance of Ohio; Arthur Vorys and Thomas B. Ridgley, Vorys, Sater, Seymour & Pease, 52 East Gay Street, Columbus, Ohio 43215, attorneys for respondent, Ohio Insurance Guaranty Association; and on Thomas H. DeChant, Stewart & DeChant, 1014 Hippodrome Building, Cleveland, Ohio, attorneys for petitioners, Ken Bailey, et al., being all parties required to be served.

William L. Schmidt
WILLIAM L. SCHMIDT

Subscribed and sworn to before me this 10th day of January, 1972.

William H. Allyn, Jr.
William H. Allyn, Jr.—Notary Public
State of Ohio—Lifetime Commission